

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

**UNITED STATES OF AMERICA and
STATE OF NEW YORK, *et al.*,**

Plaintiffs-Appellees.

**MOTION OF AMERICA ONLINE, INC.,
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE**

Pursuant to the Court's scheduling order of October 11, 2000, America Online, Inc. (AOL) respectfully moves that the Court grant AOL leave to participate as an amicus curiae (in support of the appellees) in these cases.¹ The United States and the State parties have consented to AOL's participation as an amicus, but appellant Microsoft has refused consent.

As the Court itself has recognized, these cases are of "exceptional importance" to the national economy and the continued development of the Internet. Order of June 13, 2000 (sua sponte order to hear cases en banc). The cases "significantly affect[] an important sector of the economy

¹ Pursuant to Circuit Rule 26.1, AOL states as follows: AOL has no parent company, and no publicly-held company holds a 10% or greater ownership interest in AOL. AOL and Time Warner, Inc., have announced plans to merge and are awaiting final regulatory approval. AOL provides interactive services, Web brands, Internet technologies and e-commerce services.

-- a sector characterized by rapid technological change” and that is “important to our Nation’s prosperity.” Microsoft Corp. v. United States, No. 00-139 (September 26, 2000) (Breyer, J., dissenting from denial of immediate appeal). This Court’s decisions as to, for example, the interaction of copyright and antitrust law, the proper contours of antitrust tying doctrine under 15 U.S.C. § 1, the appropriate standards under which to assess exclusive dealing, and the evaluation of predatory behavior under 15 U.S.C. § 2 will affect consumers and businesses in all industries. See generally Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). What is more, the application of these traditional doctrines to new industries and new technologies is an issue of enormous import that has yet to be conclusively resolved. See United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir.1998); see also United States v. Microsoft Corp., 87 F. Supp.2d 30, 49 (D.D.C. 2000) (approach of D.C. Circuit in Microsoft, 147 F.3d 935, is “at odds with the Supreme Court’s own approach”).

In short, these cases raise important legal issues and the resolution of those issues not only will shape the development of antitrust law into the future, but is likely to have a significant impact on the continued development of the Internet as an empowering tool for consumers everywhere. Given the undeniable significance of this case, we believe that the Court will benefit from receiving a broad spectrum of views on the legal and factual questions at issue, especially from amici with substantial and unique expertise with the technical issues that surround those questions.

It is against this backdrop that AOL seeks leave to participate as an amicus. AOL is well-positioned to provide the Court with valuable assistance in its consideration of the significant issues and questions that are presented in this appeal. AOL has been at the forefront of the Internet's

development as an important communications medium that has empowered millions of consumers all over the world. AOL has unique technological knowledge and familiarity with the industry that, we submit, would be of valuable assistance to the Court in this appeal. In addition, we note that many of the issues presented relate directly to Microsoft's conduct with respect to Netscape and the Netscape Navigator, both of which are owned by AOL. For example, the district court concluded that Microsoft's illegal activity prevented Netscape Navigator "from fulfilling [its] potential to open the market for Intel-compatible PC operating systems to competition on the merits." 87 F.Supp.2d at 39. The district court also found that "the efforts Microsoft directed at OEMs and IAPs successfully ostracized Navigator as a practical matter from the two channels that lead most efficiently to browser usage." *Id.* at 42. Because AOL now stands in Netscape's shoes for purposes of these cases, AOL is uniquely positioned to present its legal and factual perspective to this Court.

Finally, in considering AOL's motion, it bears emphasis that AOL's participation as an amicus will not unduly burden the Court or any party. The provisions of FRAP 29, Circuit Rule 29 and the October 11 scheduling order (which limits amicus briefs to 25 pages) will ensure that AOL's participation in this case (and indeed that of any amicus that is granted leave to participate) will serve as a benefit to the Court and the parties, rather than a burden.

For the foregoing reasons, AOL respectfully requests that the Court grant its motion for leave to participate as amicus curiae in these cases.

Respectfully submitted,

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October 25, 2000

CERTIFICATE OF SERVICE

I, Theodore W. Ulyot, hereby certify that on this 25th day of October 2000, I caused a true and correct copy of the foregoing America Online's Motion for Leave to Participate as *Amicus Curiae* to be served by facsimile and overnight courier upon the following:

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